

No. 8430

IN THE
United States ¹⁴
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Appellant,

vs.

JESSIE B. BOSHART, as Adminis-
tratrix of the Estate of Amaniuel
Boshart, deceased.

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, IN
AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

FILED

TRANSCRIPT OF RECORD DEC 31 1936

PAUL P. O'BRIEN,
CLERK

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CENTRAL DIVISION

TRANSCRIPT OF RECORD

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(Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italics* the two words between which the omission seems to occur.)

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

PEIRSON M. HALL
United States Attorney

ERNEST D. FOOKS
Assistant United States Attorney

Federal Building
Los Angeles, California

For Appellee:

DAVID SPAULDING
Postoffice Box No. 1
West Los Angeles, California

UNITED STATES OF AMERICA, ss.

To Jessie B. Boshart, As Adm^x. of the Est. of Amaniuel Boshart, Dec., and

To David Spaulding, Esq., her attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 3rd day of September, A.D. 1936, pursuant to Order Allowing Appeal filed August 3, 1936, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled Jessie B. Boshart, as Administratrix of the Estate of Amaniuel Boshart, deceased, vs. United States, No. 6160-H, wherein the United States of America is defendant and appellant and you are plaintiff and appellee, to show cause, if any there be, why the judgment in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Harry A. Hollzer, United States District Judge for the Southern District of California, this 3rd day of August, A.D. 1936, and of the Independence of the United States, the one hundred and sixty-first.

HOLLZER

U. S. District Judge for the Southern District
of California.

Receipt is hereby acknowledged of a copy of this citation and copies of the Petition for Appeal, Order Allow-

ing Appeal, Assignments of Error, Order Extending Time within which to Serve & File Bill of Exceptions and Extending Term, & Order Extending Time to Docket Cause on Appeal, this 3rd day of August, 1936.

DAVID SPAULDING
Attorney for Plaintiff.

(Endorsed): Filed Aug 3-1936 R. S. Zimmerman,
Clerk. By L. Wayne Thomas, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

AMANIUEL BOSHART,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 6160-H

COMPLAINT

COMES NOW the plaintiff and for cause of action against the defendant alleges as follows, to-wit:

I.

That the plaintiff is a resident of Los Angeles, County of Los Angeles, State of California. That he enlisted for military service in the United States Army on the 24th day of April, 1918, and was honorably discharged on the 4th day of March, 1919.

II.

That while in the military service of the United States during the war time period, desiring to be insured against the risks of war, said Amanuel Boshart applied for a policy of war risk insurance in the sum of Ten Thousand Dollars (\$10,000). That a certificate of war risk insurance was duly issued to him by the terms whereof the defendant agreed to pay said *defendant*, or his estate, the sum of Fifty-seven Dollars and Fifty Cents (\$57.50) per month in the event he suffered permanent and total disability to such an extent that he would be unable to follow continuously any substantially gainful occupation.

III.

That on the 1st day of April, 1927, said policy of war risk insurance was converted into a Five Year Convertible Term Policy, policy No. K-613,471, of Government Life Insurance. That while said converted policy of insurance was in force said plaintiff became permanently and totally disabled from the following disabilities, to-wit: duodenal ulcers, post operated peritoneal hernia, and adhesions; and as a result thereof became permanently and totally disabled from following continuously any substantially gainful occupation. That the plaintiff has been informed and believes, and therefore alleges as true, that he will always be so disabled and never again be able to follow continuously any substantially gainful occupation, by reason whereof there became due and owing said plaintiff the sum of Fifty-seven Dollars and Fifty Cents (\$57.50) per month commencing on the 21st day of April, 1932.

IV.

That the plaintiff has made due proof of said total and permanent disabilities to the said defendant and demanded payment of the aforesaid amounts, but the defendant disagreed with plaintiff as to his claim of disability and has wholly failed to pay to the plaintiff the sum of Fifty-seven Dollars and Fifty Cents (\$57.50) per month, or any part thereof. That said due proof consists of the records and files of this plaintiff now in the custody of the defendant. That at this time the plaintiff is totally and permanently disabled and has been since the 21st day of April, 1932.

WHEREFORE, the plaintiff demands judgment against the defendant in the sum of Fifty-seven Dollars and Fifty Cents (\$57.50) per month from the 21st day of April, 1932; plaintiff further requests refund of all premiums paid subsequent to the 21st day of April, 1932.

DAVID SPAULDING

David Spaulding

Attorney for Plaintiff.

STATE OF CALIFORNIA

County of Los Angeles—ss.

AMANIUEL BOSHART being by me first duly sworn, on oath says: That he is plaintiff in the foregoing and above entitled action; that he has read the within complaint and knows the contents thereof; and that the same is true of his own knowledge except as to the matters and things therein stated on his information or belief, and that as to those matters and things he believes it to be true.

AMANIUEL BOSHART

Subscribed and Sworn to before me this 22nd day of December, 1932.

(SEAL)

BLANCHIE M. CARLSON

Notary Public in and for said County and State.

My Commission expires Dec. 12, 1934.

(Endorsed): Filed Dec. 30, 1932. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. 6160-H

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA

County of Los Angeles—ss.

DAVID SPAULDING, being first duly sworn, upon his oath deposes and says:

That he is attorney of record for the plaintiff in the above entitled action; that on the 30th day of December, 1932, the affiant mailed a true copy of the complaint in the above entitled action to the Attorney General at Washington, D. C., by registered mail, and that on the 6th day of January, 1933, affiant served two copies of the said complaint upon Samuel W. McNabb, District Attorney for the Southern District of California, Central Division.

DAVID SPAULDING

David Spaulding

Subscribed and sworn to before me this 22 day of March, 1933.

(SEAL)

OLLIE R. SNYDER

Notary Public in and for the said
County and State.

My Commission expires June 30, 1933.

(Endorsed): Filed Mar. 22, 1933 R. S. Zimmerman,
Clerk By Theodore Hocke Deputy Clerk

[TITLE OF COURT AND CAUSE]

No. 6160-H

ANSWER

Comes now the United States of America, defendant in the above-entitled cause, by its attorneys, Peirson M. Hall, United States Attorney for the Southern District of California, and Ignatius F. Parker, Assistant United States Attorney, and H. C. Veit, of counsel, and answering plaintiff's complaint, admits, denies and alleges:

I.

Answering the allegations contained in paragraph I of plaintiff's complaint, defendant admits that plaintiff enlisted in the military service of the United States on the 24th day of April, 1918, and was honorably discharged on the 4th day of March, 1919. Defendant alleges that it is without sufficient information or belief on the remaining allegations in said paragraph to enable it to answer, and on that ground denies each and every allega-

tion in said paragraph not herein specifically admitted to be true.

II.

Answering the allegations contained in paragraph II of plaintiff's complaint, defendant admits each and every allegation contained therein.

III.

Answering the allegations contained in paragraph III of plaintiff's complaint, defendant admits that on or about the 1st day of April, 1927, policy of war risk insurance mentioned therein was converted into a Five Year Convertible Term Policy of Government Life Insurance. Defendant denies each and every allegation in said paragraph not herein specifically admitted to be true.

IV.

Answering the allegations contained in paragraph IV of plaintiff's complaint, defendant admits that plaintiff has demanded payment of insurance and that defendant has disagreed with plaintiff as to his claim of disability and has not paid plaintiff the sum of Fifty-seven Dollars and Fifty Cents (\$57.50) per month or any part thereof. Defendant denies each and every allegation in said paragraph not herein specifically admitted to be true.

WHEREFORE, defendant, United States of America, prays that plaintiff take nothing by this action; that plaintiff's complaint be dismissed; that judgment be rendered in favor of defendant for costs incurred herein, and for

such other and further relief as may be meet and just in the premises.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney.

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney.

H. C. Veit,
H. C. VEIT,
Of Counsel.

(Endorsed): Filed Jun 14, 1933. R. S. Zimmerman,
Clerk by Theodore Hocke, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

JESSIE B. BOSHART, as administratrix of the
Estate of AMANIUEL BOSHART, Deceased,
Plaintiff

vs.

UNITED STATES OF AMERICA
Defendant.

No. 6160-H

AMENDED & SUPPLEMENTAL COMPLAINT

COMES Now the plaintiff and for cause of action against
the defendant, alleges as follows, to-wit:

I.

That plaintiff is a resident of Los Angeles, County of Los Angeles, State of California.

II.

That Jessie B. Boshart, plaintiff herein, has been duly and regularly appointed administratrix of the estate of Amaniuel Boshart, deceased, by one of the judges of the Superior Court of the County of Los Angeles; that Amaniuel Boshart died on December 23, 1933.

III.

That while in the military service of the United States during the war time period, desiring to be insured against the risks of war, said Amaniuel Boshart applied for a policy of war risk insurance in the sum of Ten Thousand Dollars (\$10,000.). That a certificate of war risk insurance was duly issued to him by the terms whereof the defendant agreed to pay to Amaniuel Boshart or his estate, the sum of Fifty-seven Dollars and Fifty cents (\$57.50) per month in the event he suffered permanent and total disability to such an extent that he would be unable to follow continuously any substantially gainful occupation. That Amaniuel Boshart enlisted for military service in the United States Army on the 24th day of April, 1918, and was honorably discharged on the 4th day of March, 1919.

IV.

That on the 1st day of April, 1927, said policy of war risk insurance was converted into a Five Year Convertible Term Policy, policy No. K-613,471 of Government Life Insurance. That while said converted policy of insurance was in force, said Amaniuel Boshart became permanently

and totally disabled from the following disabilities, to-wit: duodenal ulcers, post operated peritoneal hernia, and adhesions, by reason whereof there became due and owing Amaniuel Boshart or his estate, the sum of Fifty-seven Dollars and Fifty cents (\$57.50) per month commencing on the 21st day of April, 1932.

V.

That if Amaniuel Boshart was not totally and permanently disabled on the 21st day of April, 1932, he was so disabled on the 17th day of November, 1933 and entitled to benefits of said policy of insurance from November 17, 1933.

VI.

That due proof of said total and permanent disabilities was made to the defendant and a demand for payment made of the aforesaid amounts, but the defendant disagreed with Amaniuel Boshart as to his claim of disability, and wholly failed to pay Amaniuel Boshart or his estate the sum of Fifty-seven Dollars and Fifty cents (\$57.50) per month, or any part thereof. That said due proof consists of the records and files of the insured now in the custody of the defendant.

WHEREFORE plaintiff demands judgment against the defendant in the sum of Fifty-seven Dollars and Fifty cents (\$57.50) per month from the date of total and permanent disability herein, together with a refund of all premiums paid subsequent to the date of total and permanent disability.

David Spaulding

DAVID SPAULDING

Attorney for Plaintiff.

STATE OF CALIFORNIA,
County of Los Angeles—ss.

Jessie B. Boshart being by me first duly sworn, on oath says: That she is the plaintiff in the foregoing and above entitled action; that she has read the within Complaint and knows the contents thereof; and that the same is true of her own knowledge except as to the matters and things therein stated on her information or belief, and that as to those matters and things she believes it to be true.

JESSIE B. BOSHAART.

Subscribed and Sworn to before me this 17th day of March, 1936.

(SEAL)

R. S. ZIMMERMAN
Clerk, U. S. District Court, Sou.
District of California.

By M. R. WINCHELL, Deputy Clerk.

(Endorsed): Filed Mar 17, 1936 R. S. Zimmerman,
Clerk by M. R. Winchell, Deputy Clerk

[TITLE OF COURT AND CAUSE]

No. 6160-H

DEFENDANT'S ANSWER TO PLAINTIFF'S
FIRST AMENDED COMPLAINT

COMES NOW the United States of America, the defendant in the above-entitled cause, by its attorneys Peirson M. Hall, United States Attorney for the Southern District of California, Ernest R. Utley, Assistant United States Attorney for said District, and Ernest D. Fooks,

Attorney, Department of Justice, and for answer to plaintiff's first amended complaint, denies, admits and alleges, as follows:

I.

Answering Paragraph I of plaintiff's first amended complaint, defendant admits that plaintiff is a resident of the City of Los Angeles, County of Los Angeles, State of California.

II.

Answering Paragraph II of plaintiff's first amended complaint, defendant alleges that it is without information or belief concerning plaintiff's allegations regarding her appointment as administratrix of the estate of Amaniuel Boshart, deceased, and on that ground denies each and every allegation with respect thereto. Defendant alleges and admits that Amaniuel Boshart died on December 23, 1933.

III.

Answering Paragraph III of plaintiff's first amended complaint, defendant admits that while Amaniuel Boshart was a member of the military service of the United States he applied for and was granted a contract of war risk term insurance in the principal sum of \$10,000, and that said contract provided for the payment of \$57.50 per month in the event insured suffered permanent and total disability so as to render him unable to follow continuously any substantially gainful occupation during the life of said contract. Defendant admits that Amaniuel Boshart enlisted in the United States Army on the 24th day of April, 1918, and was honorably discharged therefrom on the 4th day of March, 1919.

IV.

Answering Paragraph IV of plaintiff's first amended complaint, defendant alleges and admits that effective April 1, 1927, Amaniuel Boshart converted his \$10,000 war risk term insurance contract to a five-year convertible term policy of United States Government Life Insurance (K-613,471). Defendant denies that while said converted policy of insurance was in force Amaniuel Boshart became permanently and totally disabled and that there became due and owing him, or his estate, the sum of \$57.50 per month commencing on the 21st day of April, 1932.

V.

Answering Paragraph V of plaintiff's first amended complaint, defendant denies that Amaniuel Boshart became permanently and totally disabled on the 21st day of April, 1932, or on the 17th day of November, 1933, and that he was entitled to the benefits of his policy of insurance from November 17, 1933.

VI.

Answering Paragraph VI of plaintiff's first amended complaint, defendant denies that the insured made due proof of his permanent and total disability to the defendant. Defendant denies that it has disagreed with Amaniuel Boshart as to his claim of disability. The defendant alleges that on October 20, 1932, Amaniuel Boshart made formal claim upon the defendant for insurance benefits alleging that he had been permanently and totally disabled since January 6, 1930, and that on November 5, 1932, the defendant, by its Insurance Claims Council, denied said claim and disagreed with the insured as to

his claim that he had been permanently and totally disabled since January 6, 1930, or at any subsequent date thereto to and including November 5, 1932, and by reason thereof defendant refused to pay the insured's claim for insurance benefits, or any part thereof. Defendant denies that due proof of insured's permanent and total disability consists of the records and files of the insured now in the custody of the defendant.

WHEREFORE, the defendant, The United States of America, prays that plaintiff take nothing by this action; that plaintiff's complaint be dismissed; that judgment be rendered in favor of the defendant for costs incurred herein, and for such other and further relief as the Court may deem just and proper.

Peirson M. Hall

PEIRSON M. HALL

United States Attorney

Ernest R. Utley

ERNEST R. UTLEY

Assistant United States Attorney

Ernest D. Fooks

ERNEST D. FOOKS

Attorney, Department of Justice

Attorneys for Defendant

(Endorsed): Filed Mar 17 1936 R. S. Zimmerman,
Clerk By M. R. Winchell Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. 6160-H

STIPULATION WAIVING TRIAL BY JURY

IT IS HEREBY STIPULATED by and between counsel for both parties, and good cause appearing therefor, that a jury may be and hereby is waived at the trial of the above-entitled cause now set for March 17, 1936.

Dated this 17th day of March, 1936.

David Spaulding
DAVID SPAULDING
Attorney for Plaintiff

PEIRSON M. HALL,
United States Attorney

By Ernest D. Fooks
ERNEST D. FOOKS
Attorney, Department of Justice.

Attorneys for Defendant.

IT IS SO ORDERED this.....day of March, 1936.

.....
United States District Judge.

(Endorsed): Filed Mar 17, 1936. R. S. Zimmerman,
Clerk. By M. R. Winchell, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. 6160-H

FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

This matter coming on regularly to be heard before the undersigned, one of the Judges of the above entitled

Court, plaintiff appearing in person and by her counsel, David Spaulding, and defendant appearing by Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and from the evidence submitted, the following Findings of Fact are made:

I.

That Amanieul Boshart died on December 23, 1933, and that Jessie B. Boshart, plaintiff herein, has been duly and regularly appointed administratrix of the estate of Amanieul Boshart, deceased.

II.

That the plaintiff, Jessie B. Boshart, is a resident of the City of Los Angeles, County of Los Angeles, State of California.

III.

That Amanieul Boshart, deceased, enlisted in the United States army on the 24th day of April, 1918 and was honorably discharged therefrom on the 4th day of March, 1919. That while in the military service of the United States, he applied for and was granted a contract of war risk term insurance in sum of \$10,000.00, and that the terms of said contract provided that in the event the insured should be permanently and totally disabled while said contract was in force and effect, the defendant agreed to pay to him or his estate, the sum of \$57.50 per month. That on April 1, 1927, Amanieul Boshart converted his war risk term insurance contract into a policy of United States Government life insurance and paid premiums thereon to include December 1933.

IV.

That Amaniuel Boshart, deceased, became totally and permanently disabled on November 5, 1932 while his said policy of converted insurance was in force, and that the plaintiff herein, is entitled to recover benefits under the policy, commencing on November 5, 1932.

V.

That Amaniuel Boshart made due proof of said permanent and total disability and demanded payments under his policy of insurance, but defendant disagreed. That due proof was submitted to defendant on November 5, 1932. That the plaintiff herein, is entitled to recover all premiums paid to defendant by Amaniuel Boshart subsequent to November 5, 1932.

CONCLUSIONS OF LAW.

From the above Findings of Fact, the Court makes the following Conclusions of Law.

That the insured, Amaniuel Boshart, became permanently and totally disabled on November 5, 1932 while his said \$10,000.00 policy of United States Government life insurance was in full force and effect. That Amaniuel Boshart continued to be permanently and totally disabled until the date of his death. That the plaintiff is entitled to recover from the defendant, United States of America, benefits in accordance with the terms of the said policy of insurance from November 5, 1932.

May 7, 1936

HOLLZER

United States District Judge.

Approved as to form as
provided in Rule 44.

ERNEST D. FOOKS

Ernest D. Fooks, Attorney,
Department of Justice.

(Endorsed): Filed May 7 1936. R. S. Zimmerman,
Clerk By M. R. Winchell, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

JESSIE B. BOSHAART, as Administratrix of the
Estate of AMANIUEL BOSHAART, Deceased.
Plaintiff

vs.

UNITED STATES OF AMERICA,
Defendant.

No. 6160-H

JUDGMENT.

The above entitled cause having come on duly for trial before the undersigned, one of the Judges of the above entitled Court, plaintiff appearing in person and by her attorney, David Spaulding, the defendant, United States of America appearing by Peirson M. Hall, United States Attorney, and Ernest D. Fooks, Attorney, Department of Justice, a jury having been duly waived, and the

Court having duly considered the evidence introduced by both parties, and having on the 27th day of April, 1936 rendered an opinion in favor of the plaintiff to the effect that Amaniuel Boshart, deceased, became permanently and totally disabled on the 5th day of November, 1932 at a time his policy of insurance, No. K-613,471, in the amount of \$10,000.00 was in force, and in consequence thereof, the plaintiff herein, is entitled to receive from the defendant the sum of \$57.50 per month commencing on the 5th day of November, 1932.

NOW THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that the plaintiff recover from the defendant benefits in accordance with the terms of policy No. K-613,471, at the rate of \$57.50 per month commencing on the 5th day of November, 1932.

IT IS FURTHER ORDERED that the plaintiff herein, recover from defendant, all monies paid by Amaniuel Boshart to defendant as insurance premiums under policy No. K-613,471 subsequent to November 5, 1932.

IT IS FURTHER ORDERED that David Spaulding is entitled to receive from said Judgment as a reasonable attorney's fee for his services as attorney in the above entitled cause, ten per cent of the amount of any and all monies due plaintiff in accordance herewith. That he is entitled to receive a further sum of ten per cent of each and every payment other than the said sum found to be due hereunder, hereinafter made by the defendant to the insured, his heirs, executors and assigns, in consequence of, or as a result of the entry of this Judgment.

Said payments, however, to be made as by law in such cases provided.

DONE IN OPEN COURT this 7 day of May, 1936.

HOLLZER

United States District Judge.

Approved as to form,
as provided in Rule 44

ERNEST D. FOOKS

Ernest D. Fooks, Attorney,
Department of Justice.

Judgment entered and recorded May 7, 1936. R. S. Zimmerman, Clerk. By M. R. Winchell, Deputy Clerk.

(Endorsed): Filed May 7 1936. R. S. Zimmerman, Clerk. By M. R. Winchell, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. 6160-H

BILL OF EXCEPTIONS

BE IT REMEMBERED that heretofore, to-wit, on the 17th day of March, A.D. 1936, in the City of Los Angeles, in the said District upon the issues joined herein, the above-entitled cause came on for hearing before the Honorable Harry A. Hollzer, a Judge of the said Court, a jury having been duly waived by written stipulation; plaintiff being represented by David Spaulding, Esq., and the defendant being represented by Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of

Justice, and E. D. Conklin being present as the official court reporter.

Whereupon the defendant filed certain Requested Findings of Fact and Conclusions of Law, which read as follows:

“FINDINGS OF FACT

I.

That the plaintiff, Jessie B. Boshart, is a resident of the City of Los Angeles, County of Los Angeles, State of California;

II.

That Amaniuel Boshart died on December 23, 1933, and that Jessie B. Boshart, plaintiff herein, has been duly and regularly appointed administratrix of the estate of Amaniuel Boshart, deceased;

III.

That Amaniuel Boshart, deceased, enlisted in the United States Army on the 24th day of April, 1918, and was honorably discharged therefrom on the 4th day of March, 1919; that while in the military service he applied for and was granted a contract of war risk term insurance in the sum of \$10,000 and that the terms of said contract provided that in the event the insured should become permanently and totally disabled while said contract was in force and effect, the defendant agreed to pay him, or his estate, the sum of \$57.50 per month; that on April 1, 1927, Amaniuel Boshart, deceased, converted his war risk term insurance contract into a policy of United States Government Life Insurance and paid premiums thereon to include December, 1933;

IV.

That Amaniuel Boshart, deceased, during his life time, demanded payment of the insurance benefits under his policy of insurance and alleged in his claim that he was permanently and totally disabled from January 6, 1930; that on November 5, 1932, the defendant disputed his claim of disability and refused to pay him the sum of \$57.50 per month, or any part thereof.

V.

That the defendant has at all times had in its custody records and files relating to the physical condition of Amaniuel Boshart, deceased;

VI.

That Amaniuel Boshart was not disabled so as to prevent him from working at his usual occupation on April 21, 1932;

VII.

That Amaniuel Boshart, deceased, was not disabled so as to prevent him from following his usual occupation on November 5, 1932.

THE COURT, having made the foregoing Findings of Fact, now makes the following

CONCLUSIONS OF LAW

I.

The Court determines that by virtue of the law, and rules and regulations promulgated pursuant thereto, it has jurisdiction to determine if Amaniuel Boshart, deceased, became permanently and totally disabled on or prior to November 5, 1932;

II.

The Court determines that by virtue of the law, and rules and regulations promulgated pursuant thereto, jurisdiction has not been conferred upon this Court to determine if Amanuel Boshart, deceased, was permanently and totally disabled within the terms of his policy of insurance on November 17, 1933, or after November 5, 1932;

III.

The Court determines that the insured, Amanuel Boshart, deceased, was not permanently and totally disabled within the terms of his policy of insurance on the 21st day of April, 1932, or on the 5th day of November, 1932;

IV.

The Court determines that the records and files of the insured now in the custody of the defendant do not constitute the furnishing of due proof of the insured's permanent and total disability within the purview of the terms of his insurance policy;

V.

The Court determines that the plaintiff, Jessie B. Boshart, as Administratrix of the estate of Amanuel Boshart, deceased, is not entitled to recover the insurance sued upon, and that her suit is hereby dismissed; that judgment be entered for the defendant, the United States of America, and that the defendant be allowed its costs incurred herein."

Whereupon the following proceedings took place:

Jessie B. Boshart and other witnesses were called to the stand to testify on behalf of the plaintiff. The de-

fendant called certain witnesses to testify on its behalf. Documentary evidence was offered on behalf of the plaintiff and the defendant. At this point defendant rested.

Whereupon the following proceedings took place:

Mr. Spaulding: "If I may, I would like to offer in evidence as plaintiff's exhibit, a letter from the Veterans Administration, from the office of the solicitor, signed by James T. Brady, for the Administrator, dated September 7, 1934, * * *." (Tr. p. 88)

The Court: "That document may be marked as 'Plaintiff's Exhibit No. 4'."

(The letter referred to was received in evidence and marked Plaintiff's Exhibit No. 4) (Tr. pp. 89-90).

No. 6160-H Law Boshart vs. U. S. A. Plf's Exhibit No. 4. Filed 3-17 1936 R. S. Zimmerman, Clerk U. S. Dist. Court So. Dist. Calif. By M. R. Winchell, Deputy Clerk.

(Seal—Veterans Administration—1930)

41

Office of
the Solicitor

VETERANS ADMINISTRATION

WASHINGTON

Sep 7-1934

Your File Reference:

In reply refer to: CAB-5

BOSHART, Amaniuel

XC 1 494 955

Same vs. United States

Mr. David Spaulding
Attorney at Law
15-16 Waters Building
West Los Angeles, California

Dear Sir:

This is in reference to the above entitled case pending in the United States District Court of Los Angeles, California. The veteran instituted said suit seeking recovery on his converted policy, K 613 471, alleging permanent total disability from April 21, 1932.

While this suit was pending the veteran died, on December 23, 1933, on which date said policy was in force, premiums having been paid through the month of December, 1933.

There is no lien against this policy and the full amount of \$10,000.00 insurance is payable in one sum to the designated beneficiaries: Jessie Bell Boshart, the widow, and Edna Lucile Boshart, daughter, share and share alike.

In accordance with the terms of the policy, no portion of this insurance is payable to the estate of the veteran even though it is now determined that the veteran was permanently and totally disabled prior to his death.

At the time of the death of the veteran his claim was being reviewed by the Veterans' Administration. However, in view of his death and according to the terms of the policy, no advantage will be gained under said policy in now seeking a permanent and total disability rating for insurance purposes and there can be no refund of any premiums paid prior to the death of the veteran.

Under the decision of the Comptroller General of June 27, 1922 (1 C. C. 756), it was held:

“Where a policy of converted insurance provides in effect that all insurance not paid to the insured as disability benefit during his lifetime shall be paid to the beneficiary as death benefit after his death, and no payment has been made to the insured of disability insurance during his lifetime, a finding by the director of permanent total disability existing prior to his death does not mature the policy for the purpose of a disability insurance award, and the refund of premiums collected for any period prior to death is unauthorized.”

In view of the foregoing the Director of Insurance advises this office that when the litigation in this case is terminated appropriate action will be taken by his service to award the insurance benefits to the designated beneficiaries in accordance with the terms of the policy in application. Upon being advised of the dismissal of the

suit instituted by the veteran and receipt of the certified copy of the order of dismissal, prompt action will be taken by the Veterans' Administration to pay this insurance as above stated.

For the Administration,

JAMES T. BRADY

James T. Brady

Acting Solicitor

Mr. Fooks: "Now, if your Honor please, as defendant's exhibit next in order, I wish to offer in evidence a letter on the stationery of the Veterans' Administration, Los Angeles, California, dated May 22, 1934, addressed to the Acting Solicitor, Veterans' Administration, Washington, D. C., and bearing the signature of H. C. Veit, Chief Attorney."

The Court: "It may be marked as Defendant's Exhibit D."

(The letter referred to was received in evidence and marked Defendant's Exhibit D.) (Tr. p. 90)

(Seal—Veterans Administration—1930)

VETERANS ADMINISTRATION FACILITY

Los Angeles, Calif.

May 22, 1934.

Your File Reference:

In reply refer to L-L. 1

BOSHART, Amaniuel

XC-1,494,955

Amaniuel Boshart

vs.

United States —

No. 6160-H

Acting Solicitor,
Veterans Administration,
Washington, D. C.

Dear Sir:—

Receipt is acknowledged of your letter of May 12, 1934, in connection with the above captioned case. Note has been taken of the enclosure submitted with your communication, same being copy of letter addressed to Congressman Carpenter by Mr. David Spaulding, attorney at law, West Los Angeles, California, who is representing the interested parties in connection with the war risk insurance action pending in this District.

A careful check has been made of the complete files and records in this case now in the possession of the U. S. Attorney's Office in connection with the pending litigation and the following data is submitted for the information and guidance of Central Office:

Suit was filed in the local District Court January 12, 1933, on a converted policy of insurance seeking a recovery because of a permanent and total condition alleged to have existed from April 21, 1932. The insurance files show that the full amount of the original term insurance was in full force and effect to and including March, 1927. On April 1, 1927 this was converted into a five-year convertible term policy and premiums paid to include March, 1932. On April 1, 1932, plan was changed to whole life and premiums thereon paid to include December, 1933. The veteran died December 23, 1933, and the death certificate shows the cause of death to be gastro-jejunal ulcer.

In checking through the various ratings made in the case subsequent to the alleged commencement of the permanent and total condition as set forth in the Complaint, it is found that on June 9, 1932 the Rating Board of the local Regional Office for disability allowance purposes rated the veteran permanent and total in fact from April 21, 1932, for the following conditions:

Duodenal Ulcer, Recurrent Active Jejunal Ulcer; Secondary Anemia.

May 29 1934

On June 23, 1933, a rating, presumably under the provisions of the Economy Act, was made and shows permanent and total from July 1, 1933.

Undoubtedly Mr. Spaulding had in mind the permanent and total in fact rating previously made and effective from April 21, 1932, and because of the existence of this record took the date April 21, 1932 as the beginning

of permanent and total as alleged in his Complaint on file in the Federal Court under the Government insurance policy, and if this date be as matter of fact the beginning of permanent and total disability, there would of necessity be a refund of premiums due subsequent to that date in addition to the payments of disability benefits under the insurance contract from the date of alleged permanent and total disability.

I am advised by the U. S. Attorney's Office that this matter is not now definitely set down for trial and therefore the files could be released to Central Office for appropriate review and any necessary action. It is suggested that Central Office recall the files for the purpose of consideration of the question of a finding administratively of permanent and total from April 21, 1932, the date previously fixed by the Rating Board as showing a permanent and total in fact condition.

By direction,

H. C. VEIT

H. C. Veit,

Chief Attorney.

No. 6160-H Law Amanuel Boshart vs. U. S. A. Deft's Exhibit No. D. Filed 3-17 1936. R. S. Zimmerman, Clerk U. S. Dist. Court, So. Dist. Calif. By M. R. Winchell, Deputy Clerk.

Received May 28 1934 Mail Sub-Div. Reader 16 Vets. Adm. 10:30.

Mr. Spaulding: "Plaintiff rests."

The Court: "Now, it is too late to hear any oral argument, * * * both sides will file concurrently a brief

within ten days, and then, after reading the other side's brief, if you want to supplement it within five days, thereafter, you may do so. * * * I think we will just put the matter on the calendar. Unless counsel are notified, there is no need of your returning here. I will put the matter on the calendar for April 13, at 2:00 p. m., with the understanding that these briefs will be in at the time suggested." (Tr., pp. 90-91).

Thereafter the case was called on April 13, 1936, at 2:00 o'clock P. M. and the Minutes of the Court show that the case was called for submission of the cause on the merits and the Court ordered same continued to April 27, 1936, at 2:00 o'clock P. M.

Thereafter, on Monday, April 27, 1936, at 2:00 o'clock P. M., the case was called and the following proceedings took place:

The Court: "I would like to inquire in this case of *Boshart vs. United States*, first, did counsel have in mind supplementing what you have incorporated in these memoranda?"

Mr. Fooks: "I have nothing except three exhibits, which I intended to put in evidence at the other hearing, which I didn't put in; but I incorporated them in my brief as defendant's Exhibits E, F, and G. * * * I wish to offer at this time a Special Finding of Fact and Conclusion of Law." (Tr., p. 94).

The above Special Finding of Fact and Conclusion of Law filed by the Defendant reads as follows:

“FINDING OF FACT

That Amanuel Boshart, deceased, died on December 23, 1933, at which time the insurance sued upon in this case was in full force and effect by reason of the payment of premiums, and the existence of permanent and total disability so as to mature the policy had not been established at the time of his death.

The Court having made the foregoing finding of fact now makes the following

CONCLUSION OF LAW

The Court determines that by the terms of the insurance policy sued upon plaintiff, Jessie B. Boshart as Administratrix of the Estate of Amanuel Boshart, deceased, is not entitled to recover disability benefits, and she is not entitled, on behalf of the estate to the recovery of insurance premiums collected prior to the insured's death.”

Mr. Fooks: “And Exhibit G * * * is the policy of insurance that is involved here, and counsel agreed that that should be in evidence to afford an interpretation of that contract in this case.”

The Court: “Well, the record may show that the case was re-opened for the introduction of these exhibits, and they will be marked accordingly.” (Tr., pp. 94-95).

Thereupon Defendant's Exhibit E, (Insured's claim for insurance benefits received by the defendant on October 20, 1932); Defendant's Exhibit F, (letter dated November 9, 1932, addressed to claimant by Director of Insurance, United States Veterans Administration denying claim for insurance benefits), and Defendant's Ex-

hibit G (a policy of United States Government Life Insurance), were received in evidence and marked by the Clerk accordingly.

Defendant's Exhibit G, insofar as believed relevant to this appeal as set forth in Defendant's Assignment of Error Number IV, reads as follows:

"PREMIUM. This insurance is granted in consideration of and subject to the terms and conditions hereinafter set forth, and in further consideration of the payment of the monthly premium of \$9.20 on the 1st day of each month for a period of sixty (60) months and thereafter the monthly premium of \$27.60 on the 1st day of each succeeding month during the lifetime of the Insured except as hereinafter provided. Receipt of the first premium is hereby acknowledged.

"MODE OF PAYMENT AT DEATH OR DISABILITY This insurance is payable in monthly installments of \$57.50 (hereinafter called the monthly installment) in the event of the total permanent disability of the Insured or of his death, unless one of the Optional Settlements is selected as hereinafter provided, then, in the event of the death of the Insured this insurance is payable in accordance with the Optional Settlement so selected."

“20. OPTIONAL SETTLEMENTS IN LIEU OF MONTHLY INSTALLMENTS OF \$5.75 PAYABLE ON THE DEATH OF THE INSURED UNDER THE TERMS OF THIS POLICY, SUBJECT TO THE BENEFICIARY PROVISIONS HEREOF.

OPTION ONE

INSURANCE PAYABLE IN ONE SUM.—Settlement under this option will be made only when selected by the Insured during his lifetime or by his last will and testament. When such selection has been made, \$1,000 will be payable in one sum at the maturity of this policy by death.”

* * *

“BENEFICIARY. This insurance, subject to the beneficiary provisions hereof, is payable to JESSIE BELL BOSHART, HIS WIFE, AND EDNA LUCILE BOSHART, HIS DAUGHTER: SHARE AND SHARE ALIKE, hereinafter called the beneficiary, IN ONE SUM.

“DISABILITY BENEFITS TO INSURED Upon due proof of the total permanent disability of the Insured while this policy is in force, the monthly installments shall, except as herein-after provided, be payable to the Insured and continue to be so payable during total permanent disability so long as he lives, and payment of all premiums due after receipt of such proof during total permanent disability shall be waived.

“DEATH BENEFITS TO BENEFICIARY. Upon due proof of the death of the Insured while this policy is in force, the monthly installments, without interest, which have accrued since the death of the Insured, the first installment being due on the date of the death of the Insured, shall be paid to the beneficiary designated, and thereafter the payment of the monthly installments shall continue to be so payable until two hundred and forty installments in all, including any paid to the Insured during his lifetime on account of total permanent disability, shall have been paid; but if two hundred and forty or more installments shall have been paid to the Insured on account of total permanent disability, no death benefit shall be payable. If Optional Settlement 1, 2, or 3 has been selected, payment shall be made accordingly, subject to deduction on account of disability payments.”

* * *

“PAYMENT OF PREMIUMS.

(a) Premiums may be paid annually, semiannually, or quarterly, in advance, in which case the premium payable will be the sum of the monthly premiums for the period discounted at three and one-half per centum per annum. The discounted premiums for these periods are stated on the first page hereof. At maturity by death or otherwise, the discounted value at three and one-half per centum per annum of the premiums paid in advance beyond the current calendar month shall be refunded to the Insured, if living; otherwise to the beneficiary.”

* * *

“TOTAL PERMANENT DISABILITY 11. Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of such total permanent disability, and any premiums paid after receipt of due proof of total permanent disability, and within the six months, shall be refunded without interest.

(a) Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

“RECOVERY FROM DISABILITY 12. Notwithstanding proof of total permanent disability may have been accepted as satisfactory, the Insured shall at any time, on demand, furnish proof satisfactory to the Director of the United States Veterans Bureau of the continuance of such total permanent disability, and if the Insured shall

fail to furnish such proof, all payments of monthly installments on account of such total permanent disability hereunder shall cease, and all premiums thereafter falling due shall be payable in conformity with this policy. Thereafter the premium to be paid, and the cash values, paid-up insurance values, and loan values shall be reduced so that the resulting premium and values shall bear the same proportion to the premium and values, respectively, specified hereon, that the commuted value of the installments (two hundred and forty less the number paid) bears to the commuted value of two hundred and forty installments. The extended-insurance values shall be modified accordingly.

“TOTAL PERMANENT DISABILITY BENEFITS UNDER PAID-UP INSURANCE. 13. If one or more monthly installments be paid on account of total permanent disability incurred under a paid-up insurance, then there shall be paid to the beneficiary upon the surrender of this policy at the death of the Insured the remaining unpaid installments (two hundred and forty less the number paid). If an optional settlement has been selected, payment shall be made accordingly.”

* * *

“BENEFICIARY. 17. The insured shall have the right at any time, and from time to time, and without the consent or knowledge of the beneficiary, to change the beneficiary under this policy within the class of beneficiaries permitted by the World War Veterans' Act or any amendment or supplement thereto. A change of beneficiary must

be made by written notice to the United States Veterans Bureau over the signature of the Insured and shall not be binding on the Bureau unless received and indorsed on the policy by the Bureau. A change of beneficiary must be forwarded to the Bureau by the Insured or his agent, and must be accompanied by the policy. A change of beneficiary may be indorsed during the lifetime of the Insured or after his death, and when so indorsed said change shall be effective as of the date the insured signed the written notice of change of beneficiary. The Bureau shall be protected in all payments made to the beneficiary last of record and before receipt of notice of a change of beneficiary, and no payments so made shall be paid again to the changed beneficiary. The Insured may exercise any right or privilege given under the provisions of this policy without the consent of the beneficiary. An original designation of a beneficiary may be made by the last will and testament, but no change of beneficiary may be made by last will and testament."

(It is agreed by counsel for plaintiff and defendant that the policy of United States Government Life Insurance in its entirety, upon which this cause is based, (Defendant's Exhibit G) may be deemed to be incorporated in Defendant's Bill of Exceptions and is a part of the Transcript of Record filed herein and may be forwarded to the United States Circuit Court of Appeals in and for the Ninth Judicial District.)

The Court: "Now, what is there to which you are especially directing our attention, as far as the policy is concerned?"

Mr. Fooks: “* * * It is the contention of the Government in this case that by the terms of the policy, where the death claim intervenes, rather, where an insured dies prior to the time that the existence of permanent and total disability has been established, that the death claim takes precedence over the disability claim, and that bars recovery of any premiums paid prior to his death. That is the only point involved in this case * * *.” (Tr., pp. 95-96).

Mr. Fooks: “At this time, your Honor, Mr. Spaulding has nothing else to offer?”

Mr. Spaulding: “No, nothing else to offer.” (Tr., pp. 96-97.)

At this point defendant moved for judgment upon four different grounds, the fourth ground being the only material ground upon which this appeal is prosecuted as set forth in Defendant’s Assignment of Error No. IV, which ground is quoted verbatim herewith:

“* * * that where no payments of disability benefits were paid to the insured during his lifetime, and the policy matured as a death claim at death, that the insured’s personal representative is barred from the recovery of disability benefits, or the refund of premiums, by reason of the terms of the policy insured upon.” (Tr., pp. 97-98.)

The Court thereupon overruled defendant’s motion and found in favor of the plaintiff and allowed defendant an exception thereto.

On the 27th day of April, 1936, the Court entered its Minute Order as follows:

“At a stated term, to-wit: The February Term, A.D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 27th day of April in the year of our Lord one thousand nine hundred and thirty six,

PRESENT:

THE HONORABLE: HARRY A. HOLLZER, District Judge.

JESSIE B. BOSHART, as Administratrix of the
Estate of Amaniuel Boshart, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

No. 6160-H-Law

This cause coming before the court for submission of the case on the merits, * * *

E. D. Fooks, Esq., presents defendant's requested special finding of fact and conclusion of law, whereupon
* * *

E. D. Fooks, Esq., moves for judgment in favor of the defendant, whereupon,

The Court finds in favor of the plaintiff, and an exception is allowed. Requested finding is denied, and exception noted.”

And thereupon, on the 7th day of May, 1936, the Court made and filed its Findings of Fact and Conclusions of Law and Judgment in said cause (reference is hereby made to said Findings of Fact and Conclusions of Law and Judgment as shown by the record herein), to which said Findings of Fact and Conclusions of Law and the Judgment of the Court the defendant at the time duly excepted and still excepts.

And thereupon, on the 12th day of May, 1936, upon the application of the defendant and for good cause shown, the following order was entered:

“ORDER EXTENDING TIME WITHIN WHICH
TO SERVE AND FILE BILL OF EXCEPTIONS

Upon motion of Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including August 7, 1936.

DATED: May 11, 1936.

HOLLZER

United States District Judge.”

And thereafter, and on the 3rd day of August, 1936, upon the application of the defendant and for good cause shown, the following order was entered:

“ORDER EXTENDING TIME WITHIN WHICH
TO SERVE AND FILE BILL OF EXCEPTIONS
AND EXTENDING TERM

Upon motion of Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including November 7, 1936.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including November 7, 1936.

DATED: August 3rd, 1936.

HOLLZER
United States District Judge.”

And thereafter the following stipulation between counsel for the respective parties was signed and filed on the 27th day of October, 1936:

“STIPULATION

IT IS HEREBY STIPULATED by counsel for the respective parties in the above-entitled cause, with the approval of the Court, that it is agreeable to plaintiff’s counsel that the defendant be allowed to extend its time for serving

and filing its proposed Bill of Exceptions, for a period of sixty days from and after November 7, 1936.

DATED this 27th day of October, 1936.

PEIRSON M. HALL

Peirson M. Hall

United States Attorney

ERNEST D. FOOKS,

Ernest D. Fooks, Attorney

Department of Justice.

Attorneys for Defendant

DAVID SPAULDING

David Spaulding

Attorney for Plaintiff

Approved and So Ordered

October 27, 1936.

HOLLZER

United States District Judge."

And thereafter, and on the 27th day of October, 1936, upon the application of the defendant and for good cause shown, the following order was entered:

"ORDER EXTENDING TIME WITHIN WHICH
TO SERVE AND FILE BILL OF EXCEPTIONS
AND EXTENDING TERM

Upon motion of Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Excep-

tions herein is hereby extended to and including January 6, 1937.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including January 6, 1937.

DATED this 27 day of October, 1936.

HOLLZER

United States District Judge.”

And now, in furtherance of justice, and that right may be done, the defendant, the United States of America, presents the foregoing as and for its Bill of Exceptions in the above-entitled cause, and prays that the same may be settled, allowed, signed and filed as such.

PEIRSON M. HALL

Peirson M. Hall

United States Attorney

ERNEST D. FOOKS

Ernest D. Fooks,

Attorney, Department of Justice.

The undersigned, David Spaulding, Esq., for and on behalf of Jessie B. Boshart, as Administratrix of the Estate of Amanuel Boshart, Deceased, plaintiff in the above-entitled cause, does hereby acknowledge service of the above and foregoing Bill of Exceptions this 24th day of December, 1936, and having examined the same does agree that the same contains all the pertinent evidence

and proceedings had on the trial of this action insofar as it affects the Defendant's appeal filed herein, and that it is full, true and correct in all respects, and that the same may be allowed, settled, signed and filed and made a part of the record in said cause, and does hereby waive the right to be present at the settlement and allowance of said bill of exceptions.

DAVID SPAULDING

David Spaulding

Attorney for Plaintiff.

And thereupon, and on the 24th day of December, 1936, upon due notice to the said Jessie B. Boshart, as Administratrix of the Estate of Amanuel Boshart, Deceased, plaintiff, and within the time heretofore granted by the Court and pursuant to the rules of the Court and Statute appertaining thereto for the presenting, signing and filing of said Bill of Exceptions herein, the foregoing Bill of Exceptions is duly tendered by the United States of America, defendant, for signing, settlement, and allowance as the Bill of Exceptions in said cause, and the said defendant and plaintiff having agreed that the same contains all of the pertinent evidence insofar as it affects the defendant's appeal filed herein, that the same contains all of the pertinent evidence and proceedings had on the trial of this action, and that it is full, true and correct in all respects;

IT IS ORDERED that Defendant's Exhibit G shall be considered as incorporated in this record and as a part of the Bill of Exceptions in this cause and that the same be separately certified by the Clerk of this Court to the

United States Circuit Court of Appeals in and for the Ninth Judicial District of the United States;

IT IS FURTHER ORDERED that the above and foregoing be and the same is hereby duly settled, certified and allowed as the Bill of Exceptions in said cause, and as being true and correct, and the same is hereby made a part of this record in said cause and ordered filed as such.

DONE this 24 day of December, 1936.

H. A. HOLLZER
United States District Judge
Trial Judge in Said Cause.

(Endorsed): Filed Dec 24 1936 R. S. Zimmerman,
Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. 6160-H

PETITION FOR APPEAL

TO: THE HONORABLE HARRY A. HOLLZER, JUDGE OF THE
ABOVE-ENTITLED COURT:

NOW COMES the Defendant, United States of America, by Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and feeling itself aggrieved by the judgment entered in this cause, hereby prays that an appeal may be allowed, to-wit: from the United States District Court for the Southern District of California to the United States Circuit Court of Appeals for the Ninth Circuit, and in this connection this Peti-

tioner, with this Petition, hereby presents its Assignments of Error.

DATED: August 3rd, 1936.,

Peirson M. Hall

PEIRSON M. HALL,

United States Attorney.

Ernest D. Fooks

ERNEST D. FOOKS, Attorney,

Department of Justice.

(Endorsed): Filed Aug 3 1936 R. S. Zimmerman,
Clerk By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. 6160-H

ORDER ALLOWING APPEAL

IT IS HEREBY ORDERED that the appeal prayed for in the Petition for Appeal in the above-entitled cause be allowed.

DATED: August 3rd, 1936.

HOLLZER

United States District Judge.

(Endorsed): Filed Aug 3 1936 R. S. Zimmerman,
Clerk By L. Wayne Thomas, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

JESSIE B. BOSHAART, as Administratrix of the
Estate of AMANUEL BOSHAART, deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

No. 6160-H

ASSIGNMENTS OF ERROR

COMES NOW the defendant, the United States of America, by Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and for its Assignments of Error, alleges as follows:

I.

That the Court erred in its refusal to grant defendant's motion for judgment upon the ground that jurisdiction has not been conferred upon the Court to determine the issues under the Plaintiff's Amended Complaint—that is, whether or not the insured had become totally and permanently disabled after November 5, 1932. The Amended Complaint recites if he "was not totally and permanently disabled on the 21st day of April, 1932, he was so disabled on the 17th day of November, 1933."

II.

That the Court erred in its refusal to grant defendant's motion for judgment upon the ground that the plaintiff

has not sustained the burden of proof by showing by a fair preponderance of the evidence that the insured became permanently and totally disabled on or prior to April 21, 1932, or on or prior to November 5, 1932, so as to be entitled here to recover disability benefits from and after either of said dates.

III.

That the Court erred in its refusal to grant defendant's motion for judgment upon the ground that the plaintiff has failed to establish due proof of the insured's permanent and total disability as contemplated by the terms of the policy insured upon.

IV.

That the Court erred in its refusal to grant defendant's motion for judgment upon the ground that where no payments of disability benefits were paid to the insured during his lifetime, and the policy matured as a death claim at death that the insured's personal representative is barred from the recovery of disability benefits, or the refund of premiums by reason of the terms of the policy insured upon.

V.

That the Court erred in its refusal to grant defendant's requested findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I.

"That the plaintiff, Jessie B. Boshart, is a resident of the City of Los Angeles, County of Los Angeles, State of California.

II.

“That Amaniuel Boshart died on December 23, 1933, and that Jessie B. Boshart, plaintiff herein has been duly and regularly appointed administratrix of the estate of Amaniuel Boshart, deceased.

III.

“That Amaniuel Boshart, deceased, enlisted in the United States Army on the 24th day of April, 1918, and was honorably discharged therefrom on the 4th day of March, 1919; that while in the military service he applied for and was granted a contract of war risk term insurance in the sum of \$10,000.00 and that the terms of said contract provided that in the event the insured should become permanently and totally disabled while said contract was in force and effect, the defendant agreed to pay him, or his estate, the sum of \$57.50 per month; that on April 1, 1927, Amaniuel Boshart, deceased, converted his war risk term insurance contract into a policy of United States Government Life Insurance and paid premiums thereon to include December, 1933.

IV.

“That Amaniuel Boshart, deceased, during his life time, demanded payment of the insurance benefits under his policy of insurance and alleged in his claim that he was permanently and totally disabled from January 6, 1930; that on November 5, 1932, the defendant disputed his claim of disability and refused to pay him the sum of \$57.50 per month, or any part thereof.

V.

“That the defendant has at all times had in its custody records and files relating to the physical condition of Amaniuel Boshart, deceased.

VI.

“That Amaniuel Boshart was not disabled so as to prevent him from working at his usual occupation on April 21, 1932.

VII.

“That Amaniuel Boshart, deceased, was not disabled so as to prevent him from following his usual occupation on November 5, 1932.

“The Court, having made the foregoing Findings of Fact, now makes the following

“CONCLUSIONS OF LAW

I.

“The Court determines that by virtue of the law, and rules and regulations promulgated pursuant thereto, it has jurisdiction to determine if Amaniuel Boshart, deceased, became permanently and totally disabled on or prior to November 5, 1932.

II.

“The Court determines that by virtue of the law, and rules and regulations promulgated pursuant thereto, jurisdiction has not been conferred upon this Court to determine if Amaniuel Boshart, deceased, was permanently and totally disabled within the terms of his policy of insurance on November 17, 1933, or after November 5, 1932.

III.

“The Court determines that the insured, Amanuel Boshart, deceased, was not permanently and totally disabled within the terms of his policy of insurance on the 21st day of April, 1932, or on the 5th day of November, 1932.

IV.

“The Court determines that the records and files of the insured now in the custody of the defendant do not constitute the furnishing of due proof of the insured’s permanent and total disability within the purview of the terms of his insurance policy.

V.

“The Court determines that the plaintiff, Jessie B. Boshart, as Administratrix of the estate of Amanuel Boshart, deceased, is not entitled to recover the insurance sued upon, and that her suit is hereby dismissed; that judgment be entered for the defendant, the United States of America, and that the defendant be allowed its costs incurred herein.”

VI.

That the Court erred in its refusal to grant defendant’s requested special finding of fact and conclusion of law as follows:

“FINDINGS OF FACT

“That Amanuel Boshart, deceased, died on December 23, 1933, at which time the insurance sued upon in this case was in full force and effect by reason of the payment of premiums, and the existence of permanent and total disability so as to mature the policy had not been established at the time of his death.

“The Court having made the foregoing finding of fact now makes the following

CONCLUSION OF LAW

“The Court determines that by the terms of the insurance policy sued upon plaintiff, Jessie B. Boshart as Administratrix of the Estate of Amanuel Boshart, deceased, is not entitled to recover disability benefits, and she is not entitled, on behalf of the estate to the recovery of insurance premiums collected prior to the insured’s death.”

VII.

That the Court erred in granting entry of judgment for the plaintiff upon the findings of fact made by the Court as follows:

I.

“That Amanuel Boshart died on December 23, 1933, and that Jessie B. Boshart, plaintiff herein, has been duly and regularly appointed administratrix of the estate of Amanuel Boshart, deceased.

II.

“That the plaintiff, Jessie B. Boshart, is a resident of the City of Los Angeles, County of Los Angeles, State of California.

III.

“That Amanuel Boshart, deceased, enlisted in the United States army on the 24th day of April, 1918 and was honorably discharged therefrom on the 4th day of March, 1919. That while in the military service of the United States, he applied for and was granted a contract of war risk term insurance in the sum of \$10,000.00, and

that the terms of said contract provided that in the event the insured should be permanently and totally disabled while said contract was in force and effect, the defendant agreed to pay to him or his estate, the sum of \$57.50 per month. That on April 1, 1927, Amaniuel Boshart converted his war risk term insurance contract into a policy of United States Government life insurance and paid premiums thereon to include December 1933.

IV.

“That Amaniuel Boshart, deceased, became totally and permanently disabled on November 5, 1932 while his said policy of converted insurance was in force, and that the plaintiff herein, is entitled to recover benefits under the policy, commencing on November 5, 1932.

V.

“That Amaniuel Boshart made due proof of said permanent and total disability and demanded payments under his policy of insurance, but defendant disagreed. That due proof was submitted to defendant on November 5, 1932. That the plaintiff herein, is entitled to recover all premiums paid to defendant by Amaniuel Boshart subsequent to November 5, 1932.”

VIII.

That the Court erred in making the following conclusions of law from its findings of fact:

CONCLUSIONS OF LAW

“That the insured, Amaniuel Boshart, became permanently and totally disabled on November 5, 1932, while his said \$10,000.00 policy of United States Government

life insurance was in full force and effect. That Amaniel Boshart continued to be permanently and totally disabled until the date of his death. That the plaintiff is entitled to recover from the defendant, United States of America, benefits in accordance with the terms of the said policy of insurance from November 5, 1932."

IX.

That the Court erred in awarding permanent and total disability benefits to the plaintiff.

X.

That the Court erred in awarding to the plaintiff all moneys paid by plaintiff's decedent to defendant as insurance premiums subsequent to November 5, 1932.

XI.

That the Court erred in the substitution of Jessie B. Boshart, administratrix of the estate of Amaniel Boshart, deceased, as party plaintiff.

DATED: August 3, 1936.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney.

Ernest D. Fooks
ERNEST D. FOOKS, Attorney,
Department of Justice.

Attorney for Defendant.

(Endorsed): Filed Aug 3, 1936 R. S. Zimmerman,
Clerk By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. 6160-H

PRAECIPE

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

You will please prepare a Transcript on Appeal herein including the following portions of the record, to-wit:

1. Citation
2. Complaint
3. Affidavit of Service of Complaint
4. Answer
5. Amended and Supplemental Complaint
6. Defendant's Answer to Amended and Supplemental Complaint
7. Stipulation Waiving Trial by Jury
8. Findings of Fact and Conclusions of Law
9. Judgment
10. Bill of Exceptions and Order forwarding Defendant's Exhibit G
11. Petition for Appeal
12. Order Allowing Appeal
13. Assignments of Error
14. This Praecipe.

Peirson M. Hall
PEIRSON M. HALL
United States Attorney

Ernest D. Fooks
ERNEST D. FOOKS,
Attorney, Department of Justice
Attorneys for Defendant and Appellant

Due service is acknowledged of the fore-going Praecipe, and it is stipulated that the contents thereof may constitute the record on Appeal.

DATED this 24th day of December, 1936.

David Spaulding

DAVID SPAULDING

Attorney for Plaintiff and Appellee

(Endorsed): Filed Dec 24, 1936. R. S. Zimmerman,
Clerk. By Edmund L. Smith, Deputy Clerk.

CLERK'S CERTIFICATE

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing Transcript containing 58 pages numbered from 1 to 58, inclusive, to be the Transcript of Record on Appeal in the within entitled action, as printed by the appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me, and contains full, true and correct copies of original documents, as follows:

Citation

Complaint

Affidavit of Service of Complaint.

Answer

Amended and Supplemental Complaint

Answer to Amended and Supplemental Complaint

Stipulation Waiving Trial by Jury

Findings of Fact and Conclusions of Law

Judgment

Bill of Exceptions

Petition for Appeal

Order Allowing Appeal

Assignment of Errors

Praecipe

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States, in and for the Southern District of California,

this.....day of December, 1936, in the year of our Lord One Thousand Nine Hundred Thirty-six, and of our Independence the One Hundred and Sixty-first.

(SEAL)

R. S. ZIMMERMAN,
Clerk,

By.....
Deputy Clerk.